Neutral citation [2014] CAT 6

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1219/4/8/13

23 April 2014

Before:

HODGE MALEK QC
(Chairman)
PROFESSOR JOHN BEATH
MARGOT DALY

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

AER LINGUS GROUP PLC

Intervener

RULING (PERMISSION TO APPEAL AND COSTS)

---

1. This ruling, which adopts the same defined terms as the Tribunal's judgment of 7 March 2014 in these proceedings ([2014] CAT 3) (the "Judgment"), concerns applications:

   (1) By Ryanair, dated 3 April 2014, for permission to appeal the Judgment to the Court of Appeal; and

   (2) By Aer Lingus, dated 4 April 2014, for an order that Ryanair pay Aer Lingus' costs of its intervention in these proceedings.

2. The Competition and Markets Authority ("CMA") and Aer Lingus each filed written observations on Ryanair's request for permission to appeal on 11 April 2014. Ryanair filed observations on Aer Lingus' application for costs on 14 April 2014.

Permission to appeal

3. Pursuant to rule 58 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) (the "Rules"), Ryanair seeks permission to appeal the Judgment on three grounds.

Procedural fairness

4. By its first ground, Ryanair submits that the Tribunal erred in law in finding that it was procedurally fair for the CC to keep secret from Ryanair (and Ryanair's external lawyers) material allegations and evidence that were relied upon by the CC in reaching its decision in the Final Report. Ryanair submits that, on the facts before the Tribunal, the correct application of the principle of procedural fairness required the CC to provide Ryanair (or at least its lawyers) with those allegations and evidence.

5. Within this ground, Ryanair submits that the Tribunal mischaracterised the CC's findings in the Final Report, failing to appreciate that the CC's general findings were based on detailed and specific evidence, and understating the extent to which the CC had relied upon such specific evidence. Ryanair also challenges the specific conclusions of the Tribunal at paragraph 143 of the Judgment.

6. Although we are satisfied that our decision in relation to the fairness of the CC's process is correct, and do not consider this ground to have a real prospect of success, we acknowledge that the ground raises important questions in relation to the extent of disclosure during merger investigations by the CC (now CMA), such that there is a compelling reason why this ground of appeal should be heard. We therefore grant permission to appeal on this ground.

Whether merger remedies should remove all possibility of an SLC

7. By its second ground, Ryanair submits that the Tribunal erred in law in finding that the CC was entitled to impose a remedy intended to ensure that there was no realistic prospect of an SLC occurring. In Ryanair's submission, the Tribunal should have found that the CC was entitled only to impose a remedy that would ensure that, on the balance of probabilities, no SLC would occur.

8. We do not consider this ground to have a real prospect of success. As the CMA correctly identifies, this ground incorrectly conflates the mischief at which the Act is directed (the SLC) with the standard of proof to which the mischief must be established. The scheme of the Act requires the CC (now CMA), once an SLC is established to the requisite standard, to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it. It does not require the CC (now CMA) to aim at a lower standard, such as to reflect the level of probability of the SLC occurring.

9. We do not consider there to be any compelling reason for this ground of appeal to be heard. Although Ryanair states that the matter has not previously been considered by the Court of Appeal, that is likely due to the clear and unambiguous wording of the Act.

Duty of sincere cooperation

10. By its third ground, Ryanair submits that the Tribunal erred in law in finding that ordering the divestment of all but 5% of Ryanair's stake in Aer Lingus involved no violation of the duty of sincere cooperation under Article 4(3) TEU. In Ryanair's submission, there was (and is) a material risk of a conflict with a

decision of the European Commission authorising Ryanair's acquisition of 100% of Aer Lingus (should Ryanair succeed in the General Court in Case T-260/13). Ryanair submits that the Tribunal misconstrued both the terms of the EUMR and the relevant test for assessing when the duty is engaged. It also contends that the Tribunal failed to assess the degree of risk of conflicting decisions, and took into account an irrelevant consideration, namely the delay between Ryanair's acquisition of the stake and the time likely to be taken for the General Court and European Commission to reach any new decision in relation to the authorisation of a 100% bid.

11. In our view, this ground turns on the relatively narrow question of whether it is an EU objective that a proposed concentration which has been cleared under the EUMR does in fact take place. We recognise that there is no directly analogous precedent and this is a matter which is quite properly fit to be considered by the Court of Appeal. We are satisfied that this ground of appeal might have a real prospect of success and therefore we grant permission to appeal on this ground.

Costs

12. Aer Lingus submits that the Tribunal should depart from its "general position" that interveners should bear their own costs, and make a costs award in Aer Lingus' favour, for the following main reasons:

    (1) Aer Lingus is in a different position from most interveners. It is not merely a party that stands to benefit or be harmed by a regulator's decision. Rather, Aer Lingus is the "very vehicle through which the CC has found that Ryanair has brought about anti-competitive harm".

    (2) Aer Lingus contributed usefully to the proceedings, notably on the question of jurisdiction, and was able to contribute relevant factual clarifications.

    (3) Aer Lingus has been put to considerable cost in defending each of Ryanair's three unsuccessful bids, and Ryanair's application forms part of a longstanding strategy of delay. Ryanair should not be indulged beyond its statutory rights.

(4) Aer Lingus was awarded the costs of its intervention before the General Court, Court of Appeal and Supreme Court. Those courts similarly have an unfettered discretion in relation to interveners' costs.

13. We have carefully considered Aer Lingus' present application, and whether the grounds raised by Aer Lingus might justify a departure from the Tribunal's general position that interveners should bear their own costs. The underlying reasoning for that general position has been well ventilated in previous Tribunal judgments (see, for example, *Vodafone Limited v. Office of Communications* [2008] CAT 39 at [25]).

14. We do not consider that any of the grounds put forward by Aer Lingus justify a departure from the general position in the particular circumstances of this case, for the following reasons:

(1) Notwithstanding the forceful submissions deployed by Aer Lingus in its application, where Aer Lingus describes itself as the "vehicle through which … Ryanair has brought about anti-competitive harm" and the present litigation as "an extension of the SLC", we do not consider that the position of Aer Lingus is fundamentally different from that of other targets of hostile M&A activity.

(2) Although we found Aer Lingus' contribution helpful on certain issues, we do not consider it to have been so exceptionally helpful as to justify a departure from the general position.

(3) We do not consider that it is appropriate to take account of the costs that have been incurred more broadly by Aer Lingus in resisting Ryanair's unsuccessful attempts to acquire it. As regards Ryanair's broader strategy, we agree with the conclusions of the Tribunal in its costs order of 8 November 2012 in the earlier *Ryanair* proceedings ([2012] CAT 29), at paragraph 7, and do not consider that – certainly as far as this Tribunal is concerned – Ryanair has been "indulged beyond its statutory rights". The Tribunal has not entertained any challenge by Ryanair that went beyond the confines of the jurisdiction conferred on the Tribunal by the Act.

(4) Notwithstanding the broad discretion conferred by rule 55 of the Rules, we do not consider that there is any basis for departing from the Tribunal's general position in this case, nor do we find that the orders of other courts provide a sufficient reason to depart from that general position.

CONCLUSION

15. For the reasons set out above, our unanimous decision is that:

(1) Permission to appeal be granted in relation to grounds 1 and 3 of Ryanair's application for permission to appeal.

(2) Aer Lingus' application for costs be refused.

16. We note the CMA's application that the Tribunal abridge time for Ryanair to renew its application to the Court of Appeal. Given that any such renewed application would necessarily be limited in its scope to submissions on ground 2 alone, and given the broader need for expedition in merger cases, we consider that it is appropriate to direct that any renewed application for permission in respect of ground 2 should be brought within seven days of the date of this ruling pursuant to CPR 52.4(2)(a).

Hodge Malek QC Professor John Beath Margot Daly

Charles Dhanowa OBE, QC
(*Hon*)
Registrar

Date: 23 April 2014